UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

LAMBARD INCORPORATED

and Case No. 31-CA-26983

TILE, MARBLE & TERRAZZO,
LOCAL 18 CA

Katherine Braun Mankin, Esq.,
for the General Counsel.

Jeffrey B. Demain, Esq.
(Altshuler Berzon Nussbaum Rubin & Demain)
of San Francisco, CA, for the Charging Party.

Alan R. Berkowitz, Esq. (Bingham McCutchen LLP)
of San Francisco, CA, for the Respondent.

DECISION

I. Statement of the Case

Thomas M. Patton, Administrative Law Judge. A hearing was held in this matter at Los Angeles, California, on October 17, 2005. The charge was filed by Tile, Marble & Terrazzo Local 18 CA (the Union) on August 26, 2004, and was served on Lambard Incorporated (the Respondent or the Employer) the following day. The complaint alleges that the Respondent has violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent answered, denying any violation. Counsel for the General Counsel, the Union and the Respondent each filed a helpful post-hearing brief that was carefully considered.[1]

II. Findings of Fact

A. Jurisdiction

The Respondent is a California corporation with an office and primary place of business in Chino, California. The Respondent meets the Board's $50,000 direct outflow standard for asserting jurisdiction and is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

[1] The arguments of the Union are not inconsistent with those of the General Counsel and are not separately addressed.

B. The Labor Organization

The record shows that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The question presented is whether the Respondent violated Section 8(a)(1) and (5) of the Act when it refused to maintain a Section 8(f) relationship with the Union and did not abide by a collective bargaining agreement negotiated by the Union and the Associated Tile Contractors of Southern California (herein ATC), effective from June 1, 2004, through May 31, 2007. The General Counsel contends that the Respondent was bound to that agreement based on a written agreement between the Respondent and the Union made on February 17, 2000, wherein the Respondent agreed to abide by a multi-employer labor agreement then in effect between the Union and ATC. [2]

The evidence necessary to decide the case is not in dispute.[3] The relevant evidence consists of the pleadings, stipulations, documents and the uncontroverted testimony of Cathy Swartz and Chad Boggio. Swartz is the office administrator and secretary-treasurer of ATC. Chad Boggio is the president and secretary-treasurer of the Union. Unless otherwise noted, Chad Boggio and Respondent's president, David Lambard, conducted the transactions between the Union and the Respondent.

A. The Evidence

The Employer is a ceramic tile contractor based in Chino, California, that performs work in the building and construction industry. ATC is an employer association that negotiates multi-employer collective bargaining agreements with the Union. On July 28, 1999, ATC and the Union entered into a multi-employer collective bargaining agreement effective from June 1, 1999, through May 31, 2001 (the 1999-2001 Agreement).

On February 17, 2000, the Employer and the Union signed a one-page document (the Independent Contractor Agreement). The Independent Contractor Agreement was a printed form with blanks to insert the name and relevant information regarding an employer. The agreement stated, "Independent Contractor Agreeing To Abide By The Local 18 Tile Layer, Tile Finisher and Marble Finisher Agreement June 1, 1999 thru May 31, 2001", but did not otherwise describe the Employer's contract obligations. ATC was not a party to the Independent Contractor Agreement the Employer signed. At no relevant time was the Employer an ACT member and there is no evidence there was ever any agreement between the Employer and ATC that ATC would represent the Employer in labor matters. There is no evidence of any relevant collective bargaining history by the Employer prior to February 17, 2000.

ATC and the Union entered into a follow-on multi-employer contract to replace the 1999-2001 Agreement after it expired. The new contract was effective from June 1, 2001, through May 31, 2004 (the 2001-2004 Agreement). the Employer was not given notice of the reopening

[2] ATC is not a party to this proceeding and did not seek to intervene.

[3] Based on a written post-hearing stipulation by the General Counsel, the Respondent and the Charging Party, the transcript is corrected at page 86, line 8 to change "was" to "wasn't". The stipulation is made a part of the record.

of the 1999-2001 Agreement or the negotiation of the 2001-2004 Agreement. The 2001-2004 Agreement modified the 1999-2001 Agreement by, inter alia, specifying increased wages.

On March 29, 2002, David Lambard wrote to Union president Chad Boggio, stating that the Employer was terminating its relationship with the Union, effective May 31, 2002. Boggio replied by letter, stating that the Employer's termination letter was untimely under the "current" collective bargaining agreement, a reference to the 2001-2004 Agreement. Boggio did not cite any other reason that the termination letter was ineffective.

It is stipulated that the Respondent abided by the terms of the 2001-2004 Agreement with the exception that the General Counsel and the Charging Party contend that the Employer did not abide by Article XXIII of that agreement.

The preamble of both the 1999-2001 Agreement and the 2001-2004 Agreement state that the agreements were "…by and between the Associated Tile Contractors of Southern California (hereinafter 'ATC' or 'Contractor') and [the Union]…." Each contract covered a unit of tile laying, tile finishing and marble finishing employees in a defined geographic area, excluding all other employees and statutory supervisors.

The recognition clauses of both the 1999-2001 Agreement and the 2001-2004 Agreement state:

> The Contractor hereby recognizes the union as the sole and exclusive bargaining representative under Section 9(a) of the National Labor Relations Act, 29 U.S.C. section 159(a), of all employees and persons employed to perform work covered by this agreement.

Article XXIII of the 2001-2004 Agreement provides:

> Terms and Termination
>
> Section 1. The term of this Agreement shall be from June 1, 2001 through May 31, 2004. This Agreement shall continue in effect from year to year thereafter, from June 1 through May 31 of each year, unless either the Union or the ATC, any of the ATC's member Contractors or any other entity bound by this Agreement, give notice of a desire to change and/or terminate this Agreement to the other, in writing, at least 60 days prior to the anniversary date.
>
> Section 2. Any Contractor currently bound by this agreement, who is not a member of the ATC, hereby agrees to become a part of the multi-employer unit established by this Agreement and to be bound by the interpretation and enforcement of this Agreement. Unless written notice is sent by the signatory Contractors hereto to the Union and ATC not less than sixty (60) days nor more than ninety (90) days prior to May 31, 2004, that such signatory Contractor does not desire to be bound to any successor agreement reached between the Union and the ATC, and additionally, that such signatory Contractor wishes to terminate, amend or modify the existing agreement, each signatory Contractor shall be bound to each successor agreement subsequently entered into between the Union and the ATC.

There was a form "me-too" agreement for the 2001-2004 Agreement that was identical to the Independent Contractor Agreement the Employer had signed in 2000, except that it was titled "Independent Contractor Agreeing To Abide By The Local 18 Tile Layer, Tile Finisher and Marble Finisher Agreement June 1, 2001 thru May 31, 2004". There is no evidence that the Union proffered or that the Respondent signed the me-too agreement for 2001-2004 Agreement.

Article XXIII of the 1999-2001 Agreement was identical to the one in the 2001-2004 Agreement, except that the dates in Section 1 were June 1, 1999 through May 31, 2001, and the date in Section 2 was May 31, 2001.

On March 22, 2004, the Union requested that ATC provide a list of employers that ATC would be representing in negotiations for a new contract. ATC provided the requested list, which did not name the Employer. ATC maintained no records of employers, like the Respondent, that had signed an Independent Contractor Agreement.[4]

On March 29, 2004, David Lambard sent a letter to the Union by facsimile and overnight service. The letter does not indicate that it was also sent to ATC and it was not sent to ATC. The letter stated:

> Pursuant to [the 2001-2004 Agreement] and all other agreements related thereto, and pursuant to the National Labor Relations Act, Lambard, Inc. herby gives notice to terminate our relationship with [the Union], effective as May 31, 2004.

During the period February 15, 2004, through April 1, 2004, Respondent did not inform ATC that it did not desire to be bound to any successor agreement to the 2001- 2004 agreement that might be negotiated between the Union and the ATC. The Union did not inform ATC of Lambard's March 29, 2004 letter to the Union. The Union also did not answer Lambard's March 29, 2004 letter, nor did the Union have any further communication with the Employer until June 1, 2004.

At the expiration of the 2001-2004 Agreement on May 31, 2004, ATC and the Union entered into a successor agreement effective by its terms from June 1, 2004, through May 31, 2007 (the 2004-2007 Agreement). The 2004-2007 agreement modified the 2001-2004 Agreement by, inter alia, providing for increased wages.

On June 1, 2004, the Union sent the Employer a letter that stated:

> Please find enclosed two (2) copies of our current Collective Bargaining Agreement. Please fill out the information and sign where indicated and return one executed copy to me as soon as possible.

David Lambard replied to the Union by letter on June 21, 2004, by fax and by next day delivery. Lambard's letter stated that the Employer would not sign the 2004-2007 Agreement and would not be bound by its terms. Lambard referenced his March 29, 2004, letter to the Union and stated that the Employer had sent the Union formal notice that the Employer was terminating the collective bargaining agreement. Lambard wrote that the Union should contact the Employer by June 25, if the Union disagreed, and that the Employer would otherwise

[4] ATC did have the ability to identify non-member employers who were working under ATC agreements by examining trust fund reports.

assume that the Union's letter demanding that the Employer sign the 2004-2007 Agreement was a clerical error.

The Union responded to the Employer on June 23, 2004. The Union's letter set forth in full Section 2 of Article XXIII of the 2001-2004 Agreement. There was no mention in the letter of Article XXIII, Section 1. The Union's stated position was that Lambard's March 29, 2004 letter was not effective to terminate the Employer's relationship with the Union or to avert being bound by the 2004-2007 Agreement. The Union's stated reason was that a copy of the Employer's March 29, 2004 letter to the Union had not also been sent to ATC. No other defect in the termination notice was claimed. The Union letter closed by demanding that the Employer sign the 2004-2007 Agreement and threatening that if the agreement was not signed and returned to the Union, an unfair labor practice charge would be filed.

The Employer's attorney responded to the Union by a four-page letter on July 8, 2004, challenging the correctness of the Union's position on a variety of grounds. On August 26, 2004, the Union again wrote to the Employer and stated that it wanted to "clarify" its position. In the letter the Union stated that notwithstanding its June 1 and June 23 letters, the Union was not requesting that the Employer sign the 2004-2007 Agreement and stated that the Union was not contending that it was the Section 9(a) collective bargaining representative of the Employer's employees. The Union stated that its position was that the Employer was bound to the "substantive provisions" of the 2004-2007 Agreement.

It is stipulated that since on or about June 1, 2004, the Employer has not abided by the terms of the 2004-2007 Agreement and has refused to recognize the Union as the Section 8(f) collective bargaining representative of any of its employees.

B. Discussion, Analysis and Preliminary Conclusions

It is stipulated that Section 8(f) of the Act governed the Employer's relationship with the Union. Upon the expiration of a Section 8(f) agreement, a contracting union does not enjoy a presumption of majority status, and either party may repudiate the 8(f) bargaining relationship. *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). The issue is whether the General Counsel has proven that the Respondent violated the Act by refusing to abide by the 2004-2007 Agreement and by refusing to recognize the Union as the 8(f) representative of a unit of its employees after May 31, 2004.

The General Counsel begins by contending that the Respondent was bound by the 2001-2004 Agreement the Union negotiated with ATC because the Respondent did not take sufficient and timely steps to end its 8(f) relationship with the Union under the terms of the 1999-2001 Agreement. The General Counsel then argues that Respondent's May 29, 2004 letter to the Union was not sufficient to terminate the 8(f) relationship because the Respondent did not give written notice to ATC under Article XXIII, Section 2 of the 2001-2004 Agreement. The General Counsel contends that this conclusion is required by the decision in *Cowboy Scaffolding, Inc.*, 326 NLRB 1050 (1998), and that the Respondent is accordingly bound to the 2004-2007 agreement.

The Respondent contends that the Employer was not bound to the 2004-2007 Agreement because the Respondent did not affirmatively indicate a willingness to be bound to the successor agreement, based on the decision in *James Luterbach Construction Co.,* 315 NLRB 976 (1994). *Luterbach* held that the rules set forth in *Retail Associates, Inc*., 120 NLRB 388 (1958), limiting withdrawal from multi-employer bargaining units, do not apply to Section 8(f)

bargaining relationships. See also *HCL, Inc.*, 343 NLRB No. 95 (2004), where an individual employer took extra-contractual affirmative action to bind itself to a successor agreement between the union and a multi-employer bargaining group to which the employer did not belong.

The position of the General Counsel is tenable only if Article XXIII, Section 2 imposes requirements on employers like the Respondent that have only signed a me-to independent contractor agreement. I conclude that the General Counsel has misread Article XXIII, Section 2 and that only Section 1 of Article XXIII applied to the Employer.

Both Section 1 and Section 2 of Article XXIII of the 1999-2001 Agreement and of the 2001-2004 Agreement address the steps that are required to terminate or modify the agreement. There is no material difference in the meaning of the words “change and/or terminate” in Section 1 and the words “to terminate, amend or modify” that appear in section 2.

Article XXIII, Section 1 of the 1999-2001 Agreement that the Employer signed in 2000 is an automatic renewal provision of the sort commonly found in labor agreements. Automatic renewal provisions have been found effective to renew 8(f) agreements. *Fortney & Weygandt, Inc.,* 298 NLRB 863 (1990), fn. 8. By its terms, Section 1 applies to “any other entity” bound by the 1999-2001 Agreement. It is patently clear that the Employer was bound to the 1999-2001 Agreement by the Independent Contractor Agreement it signed and Article XXIII, Section 1 applied to the Employer. Indeed, there has been no contention to the contrary.

In contrast, a reasonable reading of Article XXIII, Section 2 is that it restricts employers that wish to withdraw from the multi-employer bargaining group represented by ATC, but it does not apply to employers like the Respondent that had signed an Independent Contractor Agreement, but who are not part of the multi-employer bargaining group and who are not ATC members.

There is one paragraph with two sentences in Article XXIII, Section 2. The first sentence requires any contractors currently bound by the agreement who are not ATC members ”to become a part of the multi-employer unit.” It is stipulated that the Employer was not a member of the multi-employer unit.[5] There is no contention that the Employer had a duty to bargain on a multi-employer basis. Thus, the Employer was not one of the contractors addressed in the first sentence of Section 2.

The second sentence of Article XXIII, Section 2 logically relates only to employers in the multi-employer bargaining group, addressed in the first sentence. The second sentence imposes a notice requirement on contractors who wished to terminate, amend or modify the existing agreement and binds such contractors to successor agreements if the required notice is not given. Section 2 requires notice to ATC as well as the Union. This provision served to require any employer in the multi-employer bargaining group to give advance notice of intent to withdraw from multi-employer bargaining. ATC was not a party to the Independent Contractor Agreement signed by the Employer and there is no evidence that ATC had any involvement or took any interest in the dealings between the Union and the Employer. Where the issue is whether an employer is bound to an 8(f) agreement, the Board requires that a "me too" agreement and the collective bargaining agreements it relates to be strictly confined to their

[5] The ATC agreements state that the Union was recognized as the Section 9(a) representative of the multi-employer unit. It is stipulated that Lambard had an 8(f) relationship with the Union.

precise terms. *GEM Management Co.,* 339 NLRB 489, 489 fn. 2 (2003). Accord, *Oklahoma Fixture Co*., 333 NLRB 804, 807-808 (2001).

The decision in *Cowboy Scaffolding, Inc.*, 326 NLRB 1050 (1998), is not inconsistent with the foregoing analysis. In *Cowboy Scaffolding* the respondent employer (Cowboy) signed an 8(f) me-too agreement with a union (Carpenters) that explicitly provided that Cowboy would be bound by all subsequent agreements between a multi-employer bargaining group (the Association) and Carpenters, unless the both the Association and Carpenters received written notice of withdrawal from Cowboy at least sixty but no more than ninety days prior to the termination of the then current agreement.

Cowboy worked one job under the Association agreement and never took action to terminate its relationship with Carpenters. Several years later Carpenters found Cowboy working in the geographic area covered by a successor agreement to the Association agreement. The Board rejected Cowboy's contention that it had merely signed a single-job agreement in 1993 and that it was not bound by the successor agreement.

The decision in *Cowboy Scaffolding, Inc.* is consistent with the later decisions in *GEM Management Co.,* 339 NLRB 489 (2003), discussed supra. In both cases the decision turned on the precise terms of the agreements. The successor agreement language in C*owboy Scaffolding, Inc.* could hardly be clearer. That clarity is absent in the present case.

The Employer did not give any notice to terminate its 8(f) relationship with the Union during the term of the 1999-2001 Agreement. This lack of notice by the Employer did not cause the Employer to be contractually bound to the 2001-2004 Agreement, because the successor agreement provision in Article XXIII, Section 2 of the 1999-2001 Agreement did not apply to the Employer and because the Independent Contractor Agreement did not address successor agreements. See *Fortney & Weygandt, Inc.,* 298 NLRB 863 (1990).

While the Employer was not bound to the 2001-2004 Agreement by the Independent Contractor Agreement Lambard had signed, the 1999-2001 Agreement was automatically extended through May 31, 2002, with respect to The Employer, because no action had been taken by either the Employer or the Union to forestall automatic renewal of the agreement as provided in Article XXXIII, Section 1. *Fortney & Weygandt, Inc.,* supra. A different conclusion is not warranted merely because ATC and the Union had negotiated the 2001-2004 agreement as the successor agreement to the 1999-2001 Agreement. *Id.*

Nevertheless, the Employer implicitly released the Union from the automatic extension of the 1999-2001 Agreement by following the terms of the 2001-2004 Agreement, as demanded by the Union. Assuming, without deciding, that the Employer adopted the 2001-2004 Agreement, there is no basis for concluding that the Employer thereby agreed to any contractual obligations greater than if it had had signed the Independent Contractor Agreement applicable to the 2001-2004 Agreement. The Employer was therefore not bound by Article XXIII, Section 2 of that agreement, for the same reason it was not bound to the like provision in the 1999-2001 Agreement.

The March 29, 2004 letter from David Lambard to Chad Boggio, stating that the Employer was terminating its relationship with the Union, effective May 31, 2004, satisfied the contractual requirements for the Respondent to terminate its 8(f) relationship with the Union at

the expiration of the 2001-2004 Agreement. Accordingly, the Respondent did not violate the Act when it refused to maintain a Section 8(f) relationship with the Union and abide by the 2004-2007 Agreement. I shall therefore recommend dismissal.

Conclusions of Law

1. Lambard Incorporated is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Tile, Marble & Terrazzo, Local 18 CA is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[6]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 27, 2005

Thomas M. Patton
Administrative Law Judge

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.